Darul Emas Perak Bhd v Ezaz Wealth Management & Consultancy Sdn Bhd & Anor (Mohd Fahmi bin Yahya & Anor, third parties)

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-47–01 OF 2018
SM KOMATHY J
19 APRIL 2019

Civil Procedure — Striking out — Counterclaim — Plaintiff brought action against defendants seeking refund — Second defendant raised counterclaim against plaintiff — Second defendant applied for order that counterclaim be tried together with main claim — Whether counterclaim should be subject matter of separate action — Whether unconnected counterclaim could be maintained in action — Rules of Court 2012 O 14A r 1

This was an application by the second defendant under O 14A r 1 of the Rules of Court 2012 for an order that his counterclaim be tried together with the main claim in this action. The plaintiff objected to the application on the basis that there was no nexus or connection between the claim and counterclaim, and urged the court to strike out the counterclaim. The plaintiff brought an action against the first and second defendants seeking the refund of RM900,000 paid to them in early 2014 for the purchase of shares in a public listed company called Sumatec Resources Bhd. The second defendant was a financial consultant in the first defendant company. The plaintiff alleged that based on representations made by the defendants, it entrusted the latter with the monies to purchase Sumatec Resources Bhd shares on its behalf, but the defendants in breach of trust utilised the monies for an unauthorised purpose. In their defence, the defendants acknowledged the receipt of the monies. The defendants alleged that they had in accordance with the instructions of the plaintiff purchased the Sumatec Resources Bhd shares, but sold these shares in September 2014, when the price of oil and gas stocks softened. The proceeds of the sale were paid to the first and second third parties to purchase gold as an investment. However, the third parties failed to deliver the gold. The defendants therefore sought indemnification from them if judgment was entered against them on the plaintiff's claim. The second defendant raised a counterclaim against the plaintiff for the refund of RM351,000 he had paid to AA Goldtrade purportedly for the purchase of gold bars. It was alleged that the plaintiff was liable to refund the monies as AA Goldtrade had acted as the former's agent in this transaction. During case management, the second defendant was queried about the nexus between the claim and counterclaim, and whether it should be the subject matter of a separate action. As a result of

the query, he filed the present application for his counterclaim to be heard with the main claim.

Held, striking out the counterclaim:

(1) A counterclaim could not be maintained unless it was shown to be, as regards the relief it claimed, sufficiently connected with or allied to the subject-matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim (see para 8).

(2) The counterclaim was neither connected to the plaintiff's claim nor did it arise out of the same transaction. The court was at a loss to see how the subject-matter of the counterclaim, which was a claim for refund of monies paid to AA Goldtrade as an agent of the plaintiff had any material bearing at all on the subject-matter of the claim, which was to recover monies entrusted to the defendants for an investment. The counterclaim was in no way connected with the claim as to make it necessary in the interest of justice that the counterclaim should be decided along with the defence to the plaintiff's claim (see para 12).

[Bahasa Malaysia summary

Ini adalah permohonan oleh defendan kedua di bawah A 14A k 1 Kaedah-Kaedah Mahkamah 2012 untuk perintah bahawa tuntutan balasnya dibicarakan bersama dengan tuntutan utama dalam tindakan ini. Plaintif membantah permohonan itu atas dasar bahawa tiada kaitan atau hubungan antara tuntutan dan tuntutan balas, dan menggesa mahkamah untuk membatalkan tuntutan balas itu. Plaintif membawa tindakan terhadap defendan pertama dan kedua meminta bayaran balik sebanyak RM900,000 yang dibayar kepada mereka pada awal tahun 2014 untuk pembelian saham dalam sebuah syarikat tersenarai awam yang dipanggil Sumatec Resources Bhd. Defendan kedua adalah seorang perunding kewangan dalam syarikat defendan pertama. Plaintif mendakwa bahawa berdasarkan perwakilan yang dibuat oleh defendan, ia mengamanahkannya dengan wang untuk membeli saham Sumatec Resources Bhd bagi pihaknya, tetapi defendan yang melanggar amanah menggunakan wang itu untuk tujuan yang tidak dibenarkan. Dalam pembelaan mereka, defendan mengakui penerimaan wang itu. Defendan mendakwa bahawa mereka telah mengikut arahan plaintif membeli saham Sumatec Resources Bhd, tetapi menjual saham tersebut pada bulan September 2014, apabila harga saham minyak dan gas berkurang. Hasil penjualan itu dibayar kepada pihak ketiga pertama dan kedua untuk membeli emas sebagai pelaburan. Walau bagaimanapun, pihak ketiga gagal menyerahkan emas. Oleh itu, defendan meminta ganti rugi daripada mereka jika penghakiman dibuat terhadap mereka atas tuntutan plaintif. Defendan kedua menimbulkan tuntutan balas terhadap plaintif untuk bayaran balik RM351,000 yang dia telah bayar kepada AA Goldtrade kononnya untuk pembelian bar emas. Adalah dikatakan bahawa plaintif bertanggungjawab untuk mengembalikan

A wang itu kerana AA Goldtrade telah bertindak sebagai ejen sebelumnya dalam urus niaga ini. Semasa pengurusan kes, defendan kedua telah ditanya mengenai kaitan antara tuntutan dan tuntutan balas, dan sama ada ia harus menjadi perkara tindakan berasingan. Hasil daripada pertanyaan itu, beliau memfailkan permohonan ini untuk tuntutan balasnya untuk didengar dengan
B tuntutan utama.

Diputuskan, membatalkan tuntutan balas:

(1) Sesuatu tuntutan balas tidak boleh dikekalkan melainkan jika
C ditunjukkan sebagai, berkenaan dengan relif yang dituntut itu, cukup berkaitan dengan atau bersekutu dengan hal perkara tuntutan itu untuk menjadikannya perlu demi kepentingan keadilan yang sepatutnya ditangani bersama dengan tuntutan tersebut (lihat perenggan 8).

(2) Tuntutan balas itu tidak berkaitan dengan tuntutan plaintif atau tidak
D timbul daripada transaksi yang sama. Mahkamah tidak dapat melihat bagaimana perkara subjek tuntutan balas, yang merupakan tuntutan untuk pembayaran balik wang yang dibayar kepada AA Goldtrade sebagai ejen plaintif mempunyai apa-apa kaitan material sama sekali mengenai hal perkara tuntutan itu, yang akan mendapatkan kembali
E wang yang diamanahkan kepada defendan untuk pelaburan. Tuntutan balas itu sama sekali tidak berkaitan dengan tuntutan untuk menjadikannya perlu demi kepentingan keadilan yang tuntutan balas itu harus diputuskan bersama pembelaan kepada tuntutan plaintif (lihat perenggan 12).]

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Notes

For cases on counterclaim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9361–9367.

G **Cases referred to**

Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd [1972] 1 MLJ 168; [1972] 1 LNS 31 (refd)

M/S LM Ong & Co and Others v Chia Kah Gek [2009] MLJU 1093; [2009] MLJU 1094; [2010] 6 CLJ 268, CA (refd)
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Noor Azman bin Azemi v Zahida bt Mohamed Rafik [2019] 3 MLJ 141, FC (consd)

Zahida bt Mohamed Rafik v Noor Azman bin Azemi [2018] 3 MLJ 534, CA (distd)

I **Legislation referred to**

Rules of Court 2012 O 14A r 1

Mohd Faizal bin Mohd Aris (Aris & Co) for the plaintiff.
Nur Fadilah bt Ahmad (Amelda Fuad Abi & Aidil) for the defendants.

SM Komathy J:

[1] This is an application by the second defendant, Mohd Zul Akwi bin Mat Adam, under O 14A r 1 of the Rules of Court 2012 for an order that his counterclaim be tried together with the main claim in this action. The plaintiff objected to the application on the basis that there was no nexus or connection between the claim and counterclaim, and urged the court to strike out the counterclaim.

THE FACTS

[2] The plaintiff, Darul Emas Perak Bhd, brought an action against the first and second defendants seeking the refund of RM900,000 paid to them in early 2014 for the purchase of shares in a public listed company called Sumatec Resources Bhd. The second defendant is a financial consultant in the first defendant company. The plaintiff alleged that based on representations made by the defendants, it entrusted the latter with the monies to purchase Sumatec Resources Bhd shares on its behalf, but the defendants in breach of trust utilised the monies for an unauthorised purpose.

[3] In their defence, the defendants acknowledged the receipt of the monies. The defendants alleged that they had in accordance with the instructions of the plaintiff purchased the Sumatec Resources Bhd shares, but sold these shares in September 2014, when the price of oil and gas stocks softened. The proceeds of the sale were paid to the first and second third parties to purchase gold as an investment. However, the third parties failed to deliver the gold. The defendants therefore sought indemnification from them if judgment was entered against them on the plaintiff's claim.

[4] The second defendant raised a counterclaim against the plaintiff for the refund of RM351,000 he had paid to AA Goldtrade purportedly for the purchase of gold bars. It was alleged that the plaintiff was liable to refund the monies as AA Goldtrade had acted as the former's agent in this transaction.

[5] During case management, the second defendant was queried about the nexus between the claim and counterclaim, and whether it should be the subject matter of a separate action. As a result of the query, he filed the present application for his counterclaim to be heard with the main claim. It was said that the recent decision of the Federal Court in *Noor Azman bin Azemi v Zahida bt Mohamed Rafik* [2019] 3 MLJ 141 establishes that there need not be a nexus between the claim and counterclaim.

A THE APPLICABLE LAW

[6] The legal test to be applied to determine whether a unconnected counterclaim can be maintained in an action is encapsulated in the judgement of Raja Azlan Shah J (as his Royal Higness then was) in *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168; [1972] 1 LNS 31 in the following manner:

> It is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principal claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. Thus a counterclaim for slander cannot be maintained in a claim for money lent. (See *High Commissioner for India v Ghosh* [1959] 3 WLR 811). In *Shanghai Hall Ltd v Townhouse Hotel Ltd* [1967] 1 MLJ 223, I have detailed the various factors which, by no means exhaustive, may influence a judge in the exercise of his discretion under O 21 r 15. In the present case the subject matter of the counterclaim is for alleged libel of the defendants' business. I am at a loss to see how the subject matter of the counterclaim has any material affinity at all upon the subject matter of the claim which is a claim for the price of fuel supplied. I therefore ordered the counterclaim to form the subject matter of a separate action.

[7] In a similar vein, in *M/S LM Ong & Co and Others v Chia Kah Gek* [2009] MLJU 1093; [2009] MLJU 1094; [2010] 6 CLJ 268, Gopal Sri Ram FCJ observed:

> This is a case in which the plaintiff's claim is essentially monetary in nature based on a clause in an agreement for the sale and purchase of land. The defendant's counterclaim is based on an alleged defamatory statement made in the course of correspondence. The true question is whether as a matter of procedure the counterclaim was properly joined in the present instance. In my judgment that question must be answered against the appellant. The rule of practice and procedure established by the decision in *High Commissioner for India & Ors v Ghosh* [1959] 3 WLR 811 is that:
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> > A counterclaim cannot be maintained unless it is shown that ... (see *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 LNS 31, per Raja Azlan Shah J (as His Royal Highness then was)).
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> In *Mobil Oil Malaysia Sdn Bhd v Yap Eng Hock* [1999] 1 LNS 56 Nik Hashim J attempted to distinguish the *Esso Standard* case on the ground, *inter alia*, that it was based on O 21 of the Rules of the Supreme Court 1957 which is differently constructed than RHC O 15 r 2(1). He there expressed the view that O 15 r 2(1) is wider than its precursor. As I understand his judgment, if the facts of the *Esso Standard* case were to recur today, the result may well be different. With respect I do not agree. In my judgment, the rule in *Ghosh* as explained in the *Esso Standard* case is still good law. It would make nonsense of RHC O 15 r 2(1) if it were to be read as permitting a counterclaim that claimed relief which is not sufficiently connected with or allied to the subject matter of the principal claim. I would therefore overrule

Mobil Oil Malaysia Sdn Bhd v Yap Eng Hock on this point. Since the counterclaim in the present case does not meet the test laid down in the *Esso Standard* case it must be struck out.

Sulong Matjeraie JCA added:

As a rule, counterclaim must be sufficiently connected with the claim. Material affinity with the subject matter of the claim must be present in the counterclaim for defamation cannot be maintained in an action for a claim for a declaration that the clause in the sale and purchase agreement providing for the retention of the sale proceeds by a stakeholder was of no effect.

[8] It is clear from the cases discussed above that a counterclaim cannot be maintained unless it is shown to be, as regards the relief it claims, sufficiently connected with or allied to the subject-matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim.

NOOR AZMAN BIN AZEMI V ZAHIDA BT MOHAMED RAFIK

[9] I turn now to consider the Federal Court case of *Noor Azman bin Azemi v Zahida bt Mohamed Rafik* relied on by the second defendant. There, the defendant, an actress handed cash to the plaintiff, her personal driver, for it to be banked into her account. When the defendant discovered that the plaintiff had not banked in the cash, she lodged a police report and repeated the contents of the police report at a press conference. A newspaper published an article of the incident based on the said report. The plaintiff sued the defendant for defamation based on the article. The defendant raised the defence of justification and ancillary privilege. In her counterclaim, defendant sought for the refund of the cash. Both the claim and counterclaim were tried together.

[10] Both the Court of Appeal and the Federal Court held that the plaintiff had been defamed. There is no written judgment by the Federal Court, but in para 39 of the Court of Appeal judgment *Zahida bt Mohamed Rafik v Noor Azman bin Azemi* [2018] 3 MLJ 534, it was held:

Based on the foregoing reasons, we allowed the appeal with costs of RM50,000 here and below subject to the payment of allocator fee. We set aside all of the orders of the learned trial judge. We also allowed the counterclaim as the defendant has established on the balance of probabilities that the truth of the statement in her police report that the plaintiff had run off the sum of RM243,000 which she entrusted him to bank into her account. The decision of the High Court is set aside. The deposit refunded.

[11] With respect, I am unable to see how the aforesaid case supports the position taken by the second defendant as the validity of the counterclaim was not an issue in the case and not argued. It appears that the counterclaim was

sustained as there clearly was a nexus and affinity between the plaintiff's claim and the counterclaim as both arose from the same set of facts. The relief sought in the counterclaim was for return of the monies and the claim was for damages by being defamed for being accused of having stolen the entrusted monies.

[12] That is not the case here. The counterclaim is neither connected to the plaintiff's claim nor does it arise out of the same transaction. I am at a loss to see how the subject-matter of the counterclaim, which is a claim for refund of monies paid to AA Goldtrade as an agent of the plaintiff has any material bearing at all on the subject-matter of the claim, which is to recover monies entrusted to the defendants for an investment. The counterclaim is in no way connected with the claim as to make it necessary in the interest of justice that the counterclaim should be decided along with the defence to the plaintiff's claim. Therefore, the counterclaim must be struck out.

Counterclaim struck out.

Reported by Nabilah Syahida Abdullah Salleh